Tenaga Nasional Bhd v EE-Lian Plastic Industries (M) Sdn Bhd

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22 NCVC-423 OF 2011
VARGHESE GEORGE J
30 JANUARY 2013

Evidence — Burden of proof — Shifting of — Claim by TNB for losses resulting from meter tampering — Burden on TNB to prove amount of loss of revenue due to meter tampering — Burden shifting onto user to disprove amount certified by TNB as loss of revenue

Public Utilities — Electricity — Charges for electricity — Claim for losses resulting from meter tampering — No criminal prosecution brought against defendant for meter tampering — Whether court could determine whether there was tampering resulting in under recording of electricity consumption — Whether quantum of loss of revenue suffered by plaintiff established in accordance with s 38(4) of the Electricity Supply Act 1990 ('Act') — Burden on defendant to disprove amount certified by plaintiff as loss of revenue — Whether plaintiff entitled to recover loss of revenue under s 38(3) — Whether plaintiff may only bring civil proceedings to claim loss of revenue under s 38(3) and s 38(5) after conviction obtained under s 37(1), s 37(3) or s 37(14) of the Act — Electricity Supply Act 1990 ss 37(1), (3), (14), 38(3), (4) & (5)

The plaintiff was a supplier of electric power as a licensee under the Electricity Supply Act 1990 ('Act'). The defendant was a consumer of electricity supplied by the plaintiff at the defendant's industrial premises ('the defendant's premises'). The plaintiff claimed that an inspection carried out at the defendant's premises showed that the meter at the defendant's premises to record the consumption of electricity had been 'tampered' with and was not recording the actual usage of power. It was alleged that the defendant had interfered with the metering installation and prevented it from recording the proper or actual consumption of electricity. There was no criminal prosecution brought against the defendant in respect of any of the offences. The plaintiff in this suit sought to recover from the defendant the sum of RM1,027,888.76 as its losses resulting from the tampering. The issues which arose for determination were: (i) whether there was tampering of the meter resulting in the 'under recording' of the actual consumption of electricity and whether it was for this court to determine the same; (ii) whether the quantum of the 'loss of revenue' suffered by the plaintiff had been established in accordance with s 38(4) of the Act; and (iii) whether the plaintiff was entitled pursuant to

s 38(3) of the Act to recover any such 'loss of revenue' even if so established by virtue of s 38(4) and (5) of the Act. A

Held, dismissing the plaintiff's claim with costs:

(1) It was not for this court (adjudicating a claim in the civil action), to determine or make a finding whether there was or was not an offence committed under s 37(1), s 37(3) or s 37(14). This court was not the forum to make any finding as to the commission of an offence under s 37(1), s 37(3) or s 37(14) (see para 20). B

(2) Nevertheless, in the assessment of the evidence, there was sufficient evidence to commence or initiate prosecution of the defendant for likely offence(s) under s 37(3) and/or s 37(14). The discovery of (a) the concealed 'bypass' (under the floor) in respect of two of the three phase connection of electricity to the defendant premises, and (b) of the 'timer box' and 'stop button', all extraneous to any normal meter/meter-installation, all pointed towards a willful attempt to impact the meter/meter installation from recording the actual rate of consumption of electricity at the defendant's premises. The installation of the 'bypass', the 'timer box' and 'stop button' could not have occurred without the defendant's staff, servant or agents being complicit in placing them there (see para 21). C D E

(3) Section 38(3) of the Act enabled the plaintiff to recover 'loss of revenue' arising from or caused by any offence committed under s 37(1), s 37(3) or s 37(14). As regards the computation of such quantum that was recoverable, under s 38(4) a written statement by a person duly certified by the licensee, as to amount of loss of revenue and person liable to pay is prima facie evidence of the amount to be paid by the consumer to the licensee (see paras 22–23). F

(4) By virtue of the statutorily recognised 'prima facie' effect of the evidence led in court, the burden shifted on to the defendant to disprove that amount claimed by the plaintiff. Making mere suggestions as to possible or likely errors in the computation was not sufficient. The defendant failed to disprove or challenge the formula or process employed in the computation of 'backcharges' that had been presented by the plaintiff's officers. The amount as certified and adduced by the plaintiff as 'loss of revenue' should therefore stood as conclusive against the defendant (see paras 25, 27–28). G H

(5) Civil proceedings was clearly intended by the Legislature to be brought separately under s 38(3) and s 38(5) of the Act only after a conviction under s 37(1), s 37(3) or s 37(14) had been obtained against the offender. Recoverability by the plaintiff of any 'loss of revenue', by way of a civil action, therefore required or presupposed that there was a prior I

conviction under s 37(1), s 37(3) or s 37(14) of the Act. An offence had to be shown to have been 'committed' to premise the claim in the civil proceedings to be brought against the offender pursuant to s 38(3), s 38(4) and s 38(5). There was no such prosecution or conviction of the defendant for an offence under s 37(1), s 37(3) or s 37(14). Accordingly the plaintiff could not sustain this civil claim in law, since the specific precondition to avail of the statutory cause of action under s 38(3) had not been satisfied (see paras 33–35).

[Bahasa Malaysia summary

Plaintif merupakan pembekal kuasa elektrik sebagai pemegang lesen di bawah Akta Bekalan Elektrik 1990 ('Akta'). Defendan adalah pengguna elektrik yang dibekalkan oleh plaintif di premis perindustrian defendan ('premis defendan'). Plaintif mendakwa bahawa suatu pemeriksaan yang dijalankan di premis defendan menunjukkan bahawa meter di premis defendan yang merekodkan kegunaan elektrik telah diusik dan tidak merekodkan kegunaan kuasa sebenar. Adalah didakwa bahawa defendan telah mengusik pemasangan meter dan menghalangnya daripada merekodkan penggunaan elektrik yang wajar dan benar. Tidak ada pendakwaan jenayah dibuat terhadap defendan berkaitan mana-mana kesalahan tersebut. Plaintif di dalam guaman ini memohon untuk mendapatkan semula daripada defendan sejumlah RM1,027,888.76 sebagai kerugian akibat daripada gangguan tersebut. Isu-isu yang berbangkit untuk diputuskan adalah: (i) sama ada gangguan meter tersebut mengakibatkan 'under recording' penggunaan elektrik yang sebenar dan sama ada mahkamah ini boleh memutuskannya; (ii) sama ada kuantum 'loss of revenue' yang dialami oleh plaintif telah dibuktikan berikutan s 38(4) Akta; dan (iii) sama ada plaintif berhak di bawah s 38(3) Akta untuk mendapatkan semula 'loss of revenue' tersebut walaupun ia dibuktikan berikutan s 38(4) dan (5) Akta.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Ia bukan tugas mahkamah ini (memutuskan tuntutan dalam tindakan sivil), untuk mempertimbangkan atau membuat dapatan sama ada atau tidak suatu kesalahan yang dilakukan di bawah s 37(1), s 37(3) atau s 37(14). Mahkamah ini bukanlah forum untuk membuat apa-apa penemuan berkaitan pelakuan kesalahan di bawah s 37(1), s 37(3) atau s 37(14) (lihat perenggan 20).

(2) Walau bagaimanapun, dalam penilaian keterangan, terdapat keterangan yang mencukupi untuk memulakan pendakwaan terhadap defendan bagi kesalahan yang serupa di bawah s 37(3) dan/atau 37(14). Penemuan (a) 'bypass' tersembunyi (di bawah lantai) berkaitan dua daripada tiga fasa penyambungan elektrik ke premis defendan; dan (b) berkaitan 'timer box' dan 'stop button' kesemua meter/pemasangan meter tambahan sehingga normal, kesemuanya menjurus kepada cubaan sengaja untuk menghalang meter/pemasangan meter daripada merekodkan kadar

sebenar penggunaan elektrik di premis defendan. Pemasangan 'bypass', 'timer box' dan 'stop button' tidak mungkin berlaku tanpa pekerja, kakitangan atau agen defendan terlibat dalam meletakkannya di sana (lihat perenggan 21).

(3) Seksyen 38(3) Akta membolehkan plaintif mendapatkan semula 'loss of revenue' berbangkit daripada atau diakibatkan oleh apa-apa kesalahan yang dilakukan di bawah s 37(1), s 37(3) atau s 37(14). Berkaitan dengan pengiraan kuantum sedemikian yang boleh diperoleh semula, di bawah s 38(4) suatu kenyataan bertulis oleh seorang yang diperakui oleh pemegang lesen, berkaitan dengan jumlah kerugian pendapatan dan orang yang bertanggungjawab membayar, adalah keterangan prima facie jumlah yang perlu dibayar oleh pengguna kepada pemegang lesen (lihat perenggan 22–23).

(4) Menurut keterangan 'prima facie' yang diperakui statut yang dikemukakan di mahkamah, beban beralih kepada defendan untuk mematahkan atau mencabar formula atau proses yang digunakan dalam pengiraan 'backcharges' yang telah dikemukakan oleh pegawai-pegawai plaintif. Jumlah yang diakui dan dikemukakan sebagai 'loss of revenue' itu adalah muktamad terhadap defendan (lihat perenggan 25, 27–28).

(5) Prosiding sivil adalah jelas diniatkan oleh Perundangan untuk dimulakan secara berasingan di bawah s 38(3) dan s 38(5) Akta hanya selepas sabitan di bawah s 37(1), s 37(3) or s 37(14) telah dikenakan terhadap pesalah. Pemerolehan semula oleh plaintif, apa-apa 'loss of revenue', secara tindakan sivil, oleh itu memerlukan atau mengandaikan bahawa terdapat sabitan terdahulu di bawah s 37(1), s 37(3) or s 37(14) Akta. Suatu kesalahan perlu ditunjukkan telah dilakukan untuk mendasarkan tuntutan dalam prosiding sivil dimulakan terhadap pesalah di bawah s 38(3), s 38(4) dan s 38(5). Tidak ada pendakwaan atau sabitan sedemikian terhadap defendan bagi suatu kesalahan di bawah s 37(1), s 37(3) or s 37(14). Dengan itu plaintif tidak boleh mengekalkan tuntutan sivil ini di sisi undang-undang, oleh sebab syarat terdahulu spesifik untuk menggunakan kausa tindakan statutori di bawah s 38(3) tidak dipenuhi (lihat perenggan 33–35).]

Notes

For cases on charges for electricity, see 10 *Mallal's Digest* (4th Ed, Reissue) paras 2188–2189.

For cases on shifting of burden of proof, see 7(1) *Mallal's Digest* (4th Ed, Reissue) paras 717–729.

Cases referred to

Claybricks & Tiles Sdn Bhd v Tenaga Nasional Bhd [2007] 1 MLJ 217; [2006] 4 CLJ 892, CA (refd)

Tenaga Nasional Berhad v JCY HDD Technology Sdn Bhd [2012] 3 MLJ 705, HC (refd)

Legislation referred to

Electricity Supply Act 1990 ss 2, 10, 11, 16, 37, 37(1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), 38, 38(1), 38(1A), (2), (2A), (3), (4), (5), 41

Fathima bt Mohd Idris (Idris & Associates) for the plaintiff.
Simon Tan Hong Jin (Aswar Simon & Azhar) for the defendant.

Varghese George J:

[1] After a full trial of the matter, I had on 20 December 2012 dismissed the plaintiff's suit with costs. I now set out the complete grounds for my decision.

BACKGROUND

[2] The plaintiff was a supplier of electric power as a licensee under the Electricity Supply Act 1990 ('ESA').

The defendant was a consumer of electricity that was supplied by the plaintiff under an Account No 0231–00280097–09 at the defendant's industrial premises located at Plot 137 at Lorong Perindustrian Bukit Minyak 11, Bukit Minyak Industrial Park, 1400 Bukit Mertajam, Pulau Pinang ('the defendant's premises').

[3] In this action, the plaintiff sought to recover from the defendant the sum of RM1,027,888.76 described at para 12 of the statement of claim as '… jumlah penggunaan tenaga elektrikyang tidak direkodkan … untuk tempuh dari bulan Julai 2006 hingga Ogos 2010 termasuk kos operasi dan kos jangka yang dihutangi …'

[4] The plaintiff alleged that there was a '… pemeriksaan ke atas pepasangan meter/meter' carried out on 19 August 2010 at the defendant's premises where it was discovered that there was a '… pengusikkan pada pepasangan meter/meter seperti berikut —

(i) berlaku sambungan switch timer box dari armor kabel meter;

(ii) terdapat emergency stop button yang mengawal arus S1 and S2 pada fasa kuning dan fasa biru;

(iii) nilai paparan meter tidak menunjukkan nilai sebenar berbanding arus masuk kabel; dan

(iv) meter tidak merekodkan penggunaan arus fasa kuning dan biru.

(See para 7 of the statement of claim).

[5] It was only in the opening statement and later in the submission of plaintiff's counsel, that the plaintiff's claim in this suit was expressly put forward as one brought pursuant to or premised upon s 38(3), (4) and (5) of the ESA to recover 'loss of revenue' occasioned to the plaintiff allegedly as a result of the 'pengusikkan' (tampering) of the meter or meter-installation.

It need to be pointed out too, the neither in (a) the letter of demand dated 6 October 2010 (P15), nor in (b) the *Bil Elektrik* (*Tambahan)* (P15A), both issued by the plaintiff to the defendant, was there any reference made to s 38(3) of the ESA as the basis of the plaintiff's demand for the settlement of the said sum of RM1,027,888.76.

[6] It was the plaintiff's case that on 19 August 2012 an investigation or inspection had been carried out at the defendant's premises by employees of the plaintiff attached to the plaintiff's special investigation unit (SEAL-Special Engagement Against Losses). It was thereat found that the meter and/or meter-installation at the defendant's premises to record the consumption or usage of electricity by the defendant, had been 'tampered' with and was not recording the actual usage of power. It was alleged that the defendant had interfered with the meter or metering installation and prevented it from recording the proper or actual consumption of electricity at the defendant's premises.

[7] According to the plaintiff, the key evidence which proved that there was 'tampering' as alleged and which the plaintiff's personnel had found at the defendant's premises were:

(a) the existence of a 'bypass' installed in respect two of the three phase connections (namely to S1(Phase 2/*Kuning*) and S2(Phase 3/*Biru*)) to the current transformer, discovered when the floor below which the armor cable was laid was hacked open by the investigators, and

(b) the discovery of a timer-box and an emergency stop button, which were used, to control, or in other words, engage or disengage the 'bypass'.

The offending items uncovered were tendered in court and admitted as exhs P7, P8 and P9.

TRIAL

[8] Six witnesses gave evidence for the plaintiff. PW1, PW2 and PW4 were members of the SEAL team who had carried out the inspection at the

defendant's premises on 19 August 2010 and had detected the 'tampering'. The testimony of PW3, PW5 and PW6 was in respect of how the 'loss in revenue' claimed by the plaintiff was derived.

It was PW6's evidence that in calculating the quantum of 'loss of revenue', the error of recording ('ralat') which was found to be -69.9% (at the time of inspection after corrective steps taken) was relied upon and the 'Pengiraan Purata Penggunaan Sehari' (daily average basis) was the specific method applied in this particular case to obtain the sum claimed.

[9] The defendant relied on the testimony of three witnesses in support of their defence. DW2 and DW3, who were directors of the defendant, denied any knowledge of the alleged 'tampering'.

DW1, the operations manager of the defendant, while denying any knowledge of 'tampering' nevertheless admitted that he was present when the inspection took place and he signed the 'Borang Pemeriksaan Meter LPC Voltan Rendah' ('P1'), the 'Surat Pemberitahuan Pengambilan Bahan Bahan Bukti' ('P3') and the 'Pemakluman Semakan Meter Elektrik Oleh TNB' ('P4') on behalf of the defendant after it was explained to him by the plaintiffs personnel that there had been detected irregularities in the recording of the usage of electricity by the meter installed at the premises.

DW1 stated that the meter itself was within a locked and caged enclosure only accessible to the plaintiff's staff and that he was told that only one phase of the connection (of the three phase connection) was found to have been involved.

DW1 and DW2 also stated that the defendant had not been prosecuted for any offence (theft of electricity), much less called to make any statement on the matter to the police or any relevant authority.

ISSUES

[10] In my assessment, after having heard witnesses and considered the submissions of respective counsel, there were three main areas of controversy that arose in this suit. They could be broadly categorised as follows:

(a) *issue of 'tampering'* — Whether there was 'tampering of the meter and/or of the meter-installation which resulted in the 'under recording' of the actual consumption of electricity at the defendant's premises and whether it was for this court to determine the same;

(b) quantum of 'loss of revenue' — Whether the quantum of the 'loss of revenue' suffered by the plaintiff had been established in accordance with s 38(4) of the ESA; and

(c) recoverability of loss of revenue' by the civil action — Whether the

plaintiff was entitled pursuant to s 38(3) of the ESA to recover any such 'loss of revenue' even if so established by virtue of s 38(4) and (5) of the ESA.

ISSUE OF 'TAMPERING'

[11] In assessing this controversy and the respective submission of counsel on the subject, I wrestled with a further and *more fundamental question*. This instant suit was a civil action being brought and prosecuted pursuant to s 38(3), (4) and (5) of the ESA. That fundamental question, in my view was whether in such circumstances, it was this court that was required to make any such finding or conclusion as to whether there was or there was not 'tampering' of the meter/meter-installation, as alleged by the plaintiff at the defendant's premises.

[12] This called for a proper appreciation and understanding of the scheme or order of processes envisaged by Parliament in enacting ss 37 and 38 of the ESA. Sections 37–38 were found within Part IX title 'OFFENCES AND PENALTY' of the legislation.

Sections 37 –38 of the ESA in its entirety is reproduced and set out in the schedule to this grounds of decision.

[13] On a closer and careful analysis of all the provisions comprised in ss 37 –38 of the ESA, it was my conclusion that there were *three distinct areas of processes* contemplated and provided for by the Legislature within those two sections of ESA. They were:

(a) *The first area of process* enacted the different types of *offences* pursuant to which any relevant offender as detailed there could be prosecuted and the consequential *punishment* to be imposed upon any such convictions obtained.
This formed the subject of s 37(1)–(14) of the ESA. Section 37(15) was a general overriding provision which was to apply where no specific punishment for an offence under ESA was provided for. Further s 37(16) extended the liability for such offences to even include agents and servants of the offenders.
For convenience, it would not be wrong, to refer to this first area of process as the '*criminal provisions*';

(b) *The second area of process* enabled by those provisions of the ESA was where *urgent disconnection of the supply of electricity* was permitted in specific instances. This is discussed in further detail anon.

This was what was envisaged and which formed the subject of s 38(1), (1A), (2) and (2A) of the ESA.

These provisions could be conveniently classified as the 'urgent disconnection of electricity' provisions.

To be noted here was the specific statutory stipulation that any such disconnection pursuant to s 38(1) should not exceed three months, thus underscoring the use of those provisions in urgent cases (see discussion anon, of the Court of Appeal decision in *Claybricks & Tiles Sdn Bhd v Tenaga Nasional Bhd* [2007] 1 MLJ 217; [2006] 4 CLJ 892; and

(c) *The third area of process* covered in those provisions was in regard to the *recovery of loss of revenue* by a licensee by way of a *civil action*.

Section 38(3) enabled such a recovery by civil proceedings (see s 38(5)) when a loss of revenue had been caused '… due to the offence committed under s 37(1), 37(3) and 37(14) …'.

Section 38(3), (4) and (5) of the ESA encompassed this third envisaged process, which I would refer as the 'civil action' provisions.

[14] The three processes were therefore separate and distinct when those provisions were viewed in their proper perspective with reference to the underlying objectives and intended use of those provisions as elaborated above.

[15] *Criminal Provisions.* A prosecution in respect of a suspected offence under any of the provisions of s 37(1) to s 37(14) of the ESA was within the purview of and was to be undertaken by the Suruhanjaya Tenaga (Energy Commission), according to a witness for the plaintiff.

It was not in dispute in the instant case that there was no such prosecution brought or a conviction obtained against the defendant in respect of any of the offences there.

[16] *Urgent Disconnection Provisions.* The rationale behind this separate process, as it was, was most instructively captured in the Court of Appeal judgment of Zulkefli Makinuddin JCA (as His Lordship then was) in the *Claybricks & Tiles* case where it was stated as follows:

> Pada pandangan kami peruntukan *s 38(1) Akta tersebut tidak memerlukan kesalahan dibuktikan dahulu* di mahkamah sebelum tindakan memotong bekalan elektrik boleh dilakukan oleh TNB. Dalam hal perkara ini kami lebih cenderung untuk menerima dan bersetuju dengan tafsiran dan pandangan yang di buat dalam kes *Tan Yeo Kim lwn TNB* [2000] 8 CLJ 629 di mana YA Hakim Alauddin Mohd Sharif (YA pada masa itu) telah menyatakan antara lain bahawa s 38(1) Akta tersebut tidak memerlukan satu pembuktian kesalahan oleh mahkamah sebagai pra-syarat sebelum kuasa pemotongan dapat dilaksanakan oleh TNB sebagai pemegang lesen. Seterusnya YA Hakim menyatakan *ianya digubal sebegitu rupa untuk memberi kuasa efektif kepada TNB memberhentikan dengan segera sebarang kesalahan yang berlaku dan tidak dibiarkan berlarutan.*

Kami perlu menyatakan di sini bahawa *peruntukan s 38(1) Akta tersebut adalah jelas dan terang di mana proses mahkamah tidak diperlukan untuk menentukan sama ada sesuatu kesalahan telah dilakukan sebelum tindakan di bawah seksven tersebut boleh diambil.* Sekiranya proses pembuktian kesalahan melalui mahkamah diperlukan ianya akan mengambil masa yang lama sebelum kuasa di bawah s 38(1) dapat digunakan. Kami berpendapat *s 38(1) Akta tersebut telah diperuntukkan secara spesifik untuk menjaga kepentingan TNB dan membolehkan TNB bertindak cepat dan dengan itu dapat mencegah penyalahgunaan seperti pencurian bekalan elektrik* yang dibekalkan oleh TNB.

[17] This decision affirmed a licensee's (like TNB's) right to an urgent disconnection of electricity when circumstances so warranted without proof of any prior conviction under s 37(1), 37(3) or 37(14) of the ESA as a prerequisite. Such action could be availed of where as provided there in s 38(1) '… any *person employed by the licensee* finds upon the premises evidence *which in his opinion* proves that an offence has been committed …'. The only precondition for such a drastic action to be taken was the *subjective opinion* formed by an employee of the licensee as to a likely offence under s 37(1), 37(3) or 37(14) been committed.

However when contrasted with what was expressly stated in s 38(3) — 'The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under section 37(1), 37(3) and 37(14)' it could not escape one's attention, that there was a distinction intended by the Legislature, in that the right to recover loss of revenue presupposed a conviction been entered on those offences in the first place against the consumer concerned. (More about this anon.)

[18] I could not therefore agree with counsel for the plaintiff's who attempted to argue that so much of s 38(1) which referred to the opinion of the licensee's employee even extended to apply to proceedings to be brought pursuant to s 38(3) of the ESA. The contention that s 38(3), 38(4) and 38(5) was qualified by or must be read together with s 38(1) was wholly misconceived. There was a clear distinction to be drawn as between the different processes and the objectives behind them, on the one hand urgent disconnection — s 38(1), and on the other hand what a licensee was enabled under s 38(3) of the ESA to pursue by way of civil action.

It bears repetition, that this was the conclusion of the Court of Appeal in *Claybricks & Tiles* case cited above, where it was most emphatically held that s 38(1) was enacted for a specific purpose to allow TNB to protect its interest expeditiously by urgently disconnecting electricity to prevent losses including theft of electricity; any such disconnection was in any event not to exceed three months, as already noted earlier. (The other instance when urgent disconnection could be taken was at the instance of the police in respect of gaming premises).

[19] *Civil Action provisions.* The third process (s 38(3), 38(4) and 38(5) of the ESA) was a statutorily provided cause of action to recover 'loss of revenue' by *civil proceedings*. This was intended to be separate from the criminal proceedings under s 37 of the ESA.

[20] In the result, it was my conclusion on the first issue listed above, that it was not for this court (adjudicating a claim in the civil action brought before it), to determine or make a finding whether there was or was not an offence committed under s 37(1), 37(3) or 37(14).

This court was not, for sure, the forum to make any finding as to the commission of an offence under s 37(1), 37(3) or 37(14). I was, for that reason, not inclined to enter into such an exercise and accordingly declined to do so here in this case.

[21] Nevertheless, if I was required to do that, with respect, I would only state that in my assessment of the evidence led before the court by the plaintiff, there was s*ufficient evidence to commence or initiate prosecution of the defendant* for likely offence(s) under s 37(3) and/or s 37(14).

The discovery of (a) the concealed 'bypass' (under the floor) in respect of two of the three phase connection of electricity to the defendant premises, and (b) of the 'timer box' and 'stop button', all extraneous to any normal meter/meter-installation, all pointed towards a willful attempt to impact the meter/meter installation from recording the actual rate of consumption of electricity at the defendant's premises. The installation of the 'bypass', the 'timer box' and 'stop button' could not have occurred without the defendant's staff, servant or agents being complicit in placing them there.

QUANTUM OF 'LOSS OF REVENUE'

[22] There was no question that a legislation may create a right to recover certain specific loss or provide that a party be compensated for specific reasons or acts, apart from the familiar recovery of 'damages' or 'compensation' under proceedings in 'contract' or in respect of 'tortious' claims.

Section 38(3) of the ESA, I was satisfied, was one such avenue created by law to allow a licensee under the ESA, like the plaintiff here, to recover 'loss of revenue' arising from or caused by any offence committed under s 37(1), 37(3) and/or 37(14) (that is, conviction for tampering equipment, or preventing meter from duly recording consumption, damaging meter etc).

[23] As regards the *computation of such quantum* that was recoverable, it was provided in s 38(4) that *'a written statement by an employee of the licensee duly*

certified by the licensee or any person certified by the licensee' as to:

(a) amount of loss of revenue; and

(b) person liable to pay.

was to be *prima facie evidence* of the amount to be paid by the consumer to the licensee (TNB, in this case).

[24] *'Prima Facie' evidence* (according to *Sarker's Law on Evidence* and on settled authorities) carried the meaning that it amounted to *sufficient evidence to establish a fact which unless rebutted by acceptable evidence to the contrary*, would be conclusive and binding on the counter-party.

The plaintiff relied on P12, P13 and P14 certified by their relevant officers (PW3, PW5 and PW6 called as witnesses as well) to support the plaintiff's claim, as set out in the statement of claim.

[25] By virtue of the statutorily recognised *'prima facie'* effect of the evidence led in court, the burden then shifted on to the defendant to disprove that amount claimed by the plaintiff.

In this respect, it need to be pointed out that it was the defendant's case that they were only liable to pay a further sum of 33% of the total billed sum for consumption of electricity at the defendant's premises for the period from 26 June 2006 to 19 August 2010. This was suggested or offered by the defendant as being the equivalent of the unbilled charges for that period (see defendant's letter of 9 August 2011 and the tabulation at p 48 and p 47 of the common agreed bundle of documents (Part B); the letter was *not marked* 'without prejudice').

The defendant however failed to give details as to why or how the *33%* value was chosen to apply to calculate the shortfall of *'electricity consumed'* as a result of the meter not recording the actual rate of consumption of electricity at the defendant's premises.

[26] Further it was suggested for the defendants that the statement or computation of *'backcharges'* submitted by the plaintiff did not take into consideration:

(a) the fact that the number of machines operated by the defendant could vary for day to day or during low-peak period of production at the defendant's premises; and

(b) intervening holidays and weekends, during that period.

[27] The question then for this court to decide was whether the defendant had sufficiently discharged the burden on them to displace the conclusiveness of the prima facie evidence tendered by the plaintiff.

Having given due consideration to the material and testimony before me, I was not satisfied that the defendant had displaced that burden. In my view, making mere suggestions as to possible or likely errors in the computation was not sufficient. To suggest only a 33% addition to the *'billed'* usage amount to cover the shortfall of consumed electricity, was without support of any basis or a credible calculation thereto; this was purely an arbitrary figure which was adopted by the defendant.

[28] I was satisfied, on the evidence in this case, that the defendant had failed to disprove or challenge the formula or process employed in the computation of *'backcharges'* that had been presented by the plaintiff's officers. No inroads had been made by the defendant to demolish the basis or the appropriateness of the method used by the plaintiff in the calculation or deduction made as to at the amount of *'loss of revenue'* due from the defendant, which was entitled to be recovered pursuant to s 38(3), 38(4) and 38(5) of the ESA.

It was my conclusion, *on the second issue*, that the amount as certified and adduced by the plaintiff as *'loss of revenue'* should therefore stand as conclusive against the defendant, subject of course to, whether the plaintiff had met the requirements to recover the same; this was the third issue before the court as noted earlier.

RECOVERABILITY OF THE 'LOSS OF REVENUE' BY CIVIL ACTION

[29] Notwithstanding that the amount or quantum of the *'loss of revenue'* had been established pursuant to provision of s 38(4), the question that followed was whether this sum was indeed recoverable by the plaintiff by virtue of the express terms in s 38(3) and 38(5) of the ESA.

This was the *ultimate question* on which the plaintiff would or would not succeed in this civil action.

[30] As already highlighted earlier in s 38(3) — the words used in the provision were: 'The licensee may require the consumer to pay him for the loss of revenue due to the *offence committed* under s 37(1), 37(3) and 37(14) …'

'Offence committed' given its plain and literal meaning can only mean that there ought to be a finding of guilt and conviction under s 37(1) or s 37(3) or s 37(14), in the first place.

[31] Any recourse under s 38(3) could therefore be invoked, in my considered view, *only* when there was a conviction under a prosecution brought by Suruhanjaya Tenaga in separate proceedings (presumably in the criminal courts). This was a pre-condition that had to be satisfied by plaintiff before

having resort to the enabling effect of s 38(3) to bring a civil action to recover *'loss of revenue'* caused by the acts of the offender under s 37(1), 37(3) or 37(14) of the ESA.

[32] I had occasion in another case, *Tenaga Nasional Berhad v JCY HDD Technology Sdn Bhd* [2012] 3 MLJ 705, to observe on this point as follows:

> In my assessment, going by the plain and unambiguous statutory words used, the first and primary point to take note was that any recovery of 'loss of revenue' pursuant to s 38(3) of the Act was hinged upon the commission of an offence under s 37(1), 37(3) and 37(14). A priori therefore, there must be a conviction recorded against the defendant before any right to recover 'loss of revenue' could be taken or proceeded with by the plaintiff under s 38(3) of the Act. The plain and precise words of the legislation called for a literal and strict construction to be given to that provision
>
> …
>
> The canons of interpretation of statutes (including 'purposive' reading for example) can only be availed of where the terms or words employed by the legislature in the statute created a doubt and the court had to opt for one meaning to the exclusion of another or others. This was trite …'

[33] This position taken by me that there were two separate processes and prosecutions before separate courts contemplated by the ss 37 and 38 of the ESA (one criminal, the other civil proceedings) is fortified further if one was to refer to s 41 of the ESA (the same legislation). Section 41 provided there that *'compensation for damages'* may be ordered against an offender (there, who removes, destroys or damages, any installation etc) by *the same* court before which the offender was charged for those criminal act(s). Expressly in that section there was power granted for the two aspects, criminal prosecution and a civil claim, to be dealt with together at same time.

There was no such similar provision found in respect of the criminal proceedings that was to be brought pursuant to any of the subsection in s 37. The civil proceedings was clearly therefore intended by the Legislature to be brought separately under s 38(3) and s 38(5) of the ESA *only after* a conviction under s 37(1), 37 (3), 37(14) had been obtained against the offender.

[34] Recoverability by the plaintiff of any 'loss of revenue', by way of a civil action, in my considered opinion therefore, required or presupposed that there was a prior conviction under s 37(1), 37(3) or s 37(14) of the ESA. An offence had to be shown to have been *'committed'* to premise the claim in the civil proceedings to be brought against the *'offender'* pursuant to s 38(3), 38(4) and 38(5).

[35] It was not in dispute that there was no such prosecution or conviction of

the defendant for an offence under s 37(1), 37(3) or 37(14) in the instant case. Accordingly it was my holding that the plaintiff could not sustain this civil claim in law, since the specific precondition to avail of the statutory cause of action under s 38(3) of the ESA had not been met or satisfied.

It followed then that in any event, the plaintiff's claim failed on this ground.

CONCLUSION

[36] ESA was not a piece of social legislation which called for a liberal reading and interpretation. It had to be construed strictly. It was a piece of statute that regulated the power industry and provided for the respective responsibilities, rights and roles and the interface of activities not just between the *Energy Commission* on the one hand, and *licensees* (like the plaintiff, a corporate entity) on the other hand. The provisions of the ESA was also intended to protect the rights of *consumers and the general public* affected by the activities of the licensees (see for example s 10 (power to enter on and examine land), s 11 (power to enter on land for purposes of construction) and s 16 (compensation)).

[37] As discussed and for the reasons stated above, *firstly*, it was definitely not for this court to adjudicate and determine whether an offence of *'tampering'* under s 37(1), 37(3) or 37(14) had been committed by the defendant.

Secondly, notwithstanding that the presumption as regards of the quantum of the *'loss of revenue'* had not been displaced by the defendant, the plaintiff was nevertheless precluded from any recovery of the sums claimed in this action, as there was no evidence before the court that the defendant had been convicted of an offence under s 37(1), 37(3) or 37(14) of the ESA as was required under s 38(3) of the ESA.

[38] The plaintiff's claim was accordingly dismissed with costs.

Plaintiff's claim dismissed with costs.

Reported by Kanesh Sundrum